

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY L. KINARD,

Plaintiff,

v.

Case No. 05-74131
Honorable Patrick J. Duggan

JOHN S. RUBITSCHUN ET AL.,

Defendants.

**OPINION AND ORDER DENYING PLAINTIFF'S OBJECTIONS TO THE
MAGISTRATE JUDGE'S SEPTEMBER 15, 2006 ORDER GRANTING IN PART
DEFENDANTS' OBJECTION AND MOTION TO STRIKE PLAINTIFF'S
"SUPPLEMENTAL COMPLAINT"**

At a session of said Court, held in the U.S.
District Courthouse, Eastern District
of Michigan, on November 13, 2006.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

Plaintiff, a state prisoner, filed this *pro se* civil rights action against Defendants on October 28, 2005. On July 25, 2006, Defendants filed a motion to dismiss based on Plaintiff's alleged failure to exhaust his administrative remedies. After this Court referred the motion to Magistrate Judge Wallace Capel Jr., Plaintiff filed a response to the motion on August 10, 2006. Defendants thereafter moved to strike portions of Plaintiff's response, specifically a "Supplemental Complaint" contained on pages 10-22 and grievance forms attached to the response that Plaintiff did not submit with his initial

Complaint. The Court referred Defendants' motion to strike to Magistrate Judge Capel, as well.

On September 15, 2006, Magistrate Judge Capel issued an order granting in part and denying in part Defendants' motion to strike. Magistrate Judge Capel struck the portion of Plaintiff's response containing his "Supplemental Complaint," but did not strike Plaintiff's grievance forms. At the conclusion of his order, Magistrate Judge Capel informs the parties that they have ten days from the date of the order to appeal to the district judge. Plaintiff filed objections to Magistrate Judge Capel's decision on September 28, 2006, after receiving an extension of time to do so.

Rule 72(a) of the Federal Rules of Civil Procedure provides the standard of review this Court must apply when objections are filed with respect to a magistrate judge's ruling on nondispositive matters. The rule provides in relevant part: "The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." FED. R. CIV. P. 72(a). The Court concludes that Magistrate Judge Capel's decision is neither clearly erroneous nor contrary to law.

Plaintiff objects to Magistrate Judge Capel's order based on his belief that it strikes all of page 10 of his response. Plaintiff argues that, although his "Supplemental Complaint" begins in the middle of page 10, the first half of the page includes affirmative defenses to Defendants' motion which should not be stricken. Plaintiff concedes, however, that it was proper under the Federal Rules of Civil Procedure for Magistrate

Judge Capel to strike the Supplemental Complaint as Plaintiff has not yet received permission to amend his initial Complaint. *See* Pl.'s Obj. at 5.

This Court believes that a clear reading of Magistrate Judge Capel's order indicates that he only is striking Plaintiff's Supplemental Complaint. While the magistrate judge indicates that the pleading is contained on pages 10-22 of Plaintiff's response, this Court is confident that the magistrate judge will consider, in deciding Defendants' motion to dismiss, the portion of page 10 preceding Plaintiff's Supplemental Complaint if it raises a defense to the motion.

Accordingly,

IT IS ORDERED, that Plaintiff's objections to Magistrate Judge Capel's September 15, 2006 Order are **DENIED**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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